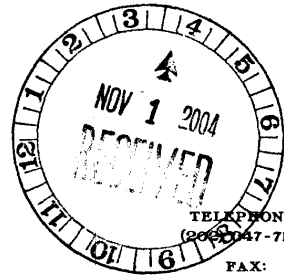


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**EXPEDITED CONSIDERATION REQUESTED**

WRITER'S E-MAIL:

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November 1, 2004

**BY HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 711  
Washington, D.C. 20423-0001

ENTERED  
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Re: **Docket No. 42072, Carolina Power & Light  
Company v. Norfolk Southern Railway Company**

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and sixteen copies of Carolina Power & Light Company's Petition for Clarification or Stay.

We also enclose an extra copy of the Petition. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter. Thank you for your attention to this matter.

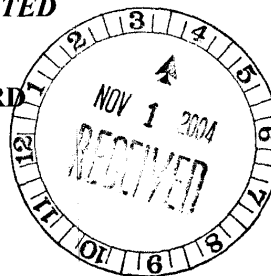
Sincerely,

C. Michael Loftus  
An Attorney for  
Carolina Power & Light Company

Enclosures

**EXPEDITED CONSIDERATION REQUESTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



CAROLINA POWER & LIGHT  
COMPANY,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY  
COMPANY,

Defendant.

Docket No. 42072

**PETITION FOR CLARIFICATION OR STAY**

CAROLINA POWER & LIGHT COMPANY

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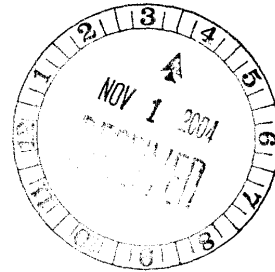
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DATED: November 1, 2004

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EXPEDITED CONSIDERATION REQUESTED

BEFORE THE  
SURFACE TRANSPORTATION BOARD



CAROLINA POWER & LIGHT  
COMPANY,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY  
COMPANY,

Defendant.

Docket No. 42072

PETITION FOR CLARIFICATION OR STAY

Pursuant to 49 C.F.R. §§ 1117.1, 1115.3 and 1115.5, Complainant Carolina Power & Light Company ("CP&L") hereby files this Petition for Clarification or Stay of the Board's decision served October 20, 2004 in STB Docket No. 42072 ("October 20th Decision" or "CP&L II") pending the disposition of a proceeding to consider the imposition of reduced rate levels based upon the Board's phasing constraint. This request for clarification or stay relief is necessitated by the lack of clarity in the Board's October 20th Decision as it applies to the parties' rights and obligations as to reparations.

BACKGROUND AND SUMMARY

In the Board's decision served December 23, 2003 in this action ("CP&L I"), the Board found that the challenged rates involved were unreasonably high under the applicable rate reasonableness standards and ordered that "Defendant shall, within 60

days, establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable rates prescribed by this decision." CP&L I at 35. The decision also ordered that "Defendant shall pay reparations and interest, in accordance with this decision and Board regulations, for all CP&L shipments covered by this complaint that moved prior to the establishment of the maximum reasonable rate pursuant to ordering paragraph 1." Id. at 36. The parties complied with these orders, reparations were paid to CP&L, and applicable rates for CP&L service were established consistent with the CP&L I decision and have been charged and paid since then.

In its CP&L II decision on reconsideration, the Board held that, based on its revised DCF calculations, "CP&L has not shown that the challenged rates are unreasonably high." CP&L II at 22. The Board ordered that the "decision is effective November 19, 2004." Id. at 25. The decision's prefatory summary paragraph states: "[o]n reconsideration, the Board modifies its prior decisions in these three rail rate cases and finds that none of the challenged rates are shown to be unreasonable under the stand-alone cost test." CP&L II at 1 (emphasis added).

The Board in CP&L II did not specifically address the issue of reparations, and it did not discontinue the proceeding. Instead, the decision states:

[i]n each of these cases, the challenged rates represented unusually large rate increases, and it may be that these increases violated the Board's phasing constraint. See Guidelines, 1 I.C.C. 2d at 546-47; Duke/NS at 39-41; Duke/CSXT at 32-33. Therefore, in each case, the complainant should advise the Board, within 30 days of the service date of this decision, whether it wishes to seek relief under the phasing constraint. If it elects to pursue this option,

it should suggest a procedural schedule for addressing the issue. If it elects not to seek such relief, the proceeding will be discontinued.

Id. at 25. The Board ordered CP&L to "advise the Board within 30 days of service of this decision whether they wish to pursue relief under the phasing constraint." Id.

CP&L intends to pursue phasing constraint relief, and to file a notice to that effect along with a proposed schedule by the November 19, 2004 deadline. Prior to such filing, CP&L intends to confer with Defendant Norfolk Southern Railway Company ("NS") to determine whether the parties can agree on a schedule. In the meantime, however, CP&L seeks clarification of the effect of the Board's CP&L I and CP&L II decisions on the parties' rights and obligations as to reparations.<sup>1</sup> CP&L understands that on November 19, 2004, the CP&L II effective date, the Board's legal prescription of maximum reasonable rates for the complaint traffic in CP&L I will be rescinded, and the ratemaking authority over the traffic at issue will be prospectively restored to NS, subject to possible further Board action in the phasing proceeding. However, the CP&L II decision does not address the handling of the reparations that NS paid to CP&L, nor additional amounts that NS may claim are due from CP&L for shipments moving after the date NS established reasonable maximum rates as directed under CP&L I.

CP&L submits that this issue requires clarification and/or affirmative action by the Board to stay the effect of CP&L II, solely with regard to the reparations issue.

For the reasons set forth herein, a balancing of the equities as well as issues of

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<sup>1</sup> Under 49 C.F.R. § 1115.3(f), a petition for stay should be filed within 10 days of service of the action.

administrative convenience clearly favor deferring resolution of all reparations issues until a final Board decision on phasing.

### **ARGUMENT**

I.     The Board Should Clarify that Reparations Need  
       Not be Re-calculated at this Time

In decisions issued on reconsideration in other SAC proceedings, the Board has modified the applicable prescription levels and specifically ordered the parties to calculate revised reparations, together with applicable interest, consistent with the revised decision. See, e.g., Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co., (STB served Sept. 27, 2004) at 32 (revising on reconsideration rate prescription and reparations award for movements of the issue traffic, and ordering parties to re-calculate what reparations (including interest), if any, were due consistent with revised decision); Docket No. 42051, Wisconsin Power and Light Co. v. Union Pacific Railroad Co., (STB served May 14, 2002) at 14 (same); Arizona Public Service Co. and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Co., 3 S.T.B. 70, 86-87 (1998) (same).

In contrast to these cases, the Board apparently refrained in CP&L II from ordering the parties to take actions at this time to calculate reparations paid and/or refunds owed to reflect the findings of the revised decision. This may be attributable to the fact that the "unusually large rate increases" involved have prompted the Board to offer CP&L (and Duke) the opportunity to pursue further proceedings in the case under

the Coal Rate Guidelines' phasing constraint. It is possible that such proceedings could result in additional reparations being paid by NS to CP&L, or to reduced refunds by CP&L to NS.

CP&L submits that a balancing of the equities and consideration of issues of administrative convenience clearly favor resolution of all reparations issues at one time upon the completion of a phasing case. This case is highly unusual in at least two respects. First, as the Board has recognized, the challenged rates represent unusually large rate increases. Second, the Board, on reconsideration, reversed a prior prescription based primarily on new evidence arising well after the close of the evidentiary record in this proceeding.

It bears noting that the determination of the proper amount of a refund by CP&L to NS based on CP&L II is not a simple matter. While the parties cooperated in developing the calculation of reparations following CP&L I, the parties' Joint Statement of Damages was not filed until some five-and-one-half months following the service date of the decision. See Joint Statement of Damages (filed June 4, 2004). Reconciliation of the parties' separate records on tons transported and transportation charges paid involves both significant effort and time.

Accordingly, CP&L requests the Board to clarify the effect of CP&L II by instructing the parties to postpone both calculation and payment of any appropriate refund/reparation amounts that may be owed by one party to the other until a final order by the Board on phasing relief.

CP&L believes that the discovery and evidentiary phases of a phasing constraint proceeding can be completed in approximately 5-6 months. The Board has indicated its intention to act promptly should phasing relief be sought. If reparation issues are held in abeyance pending disposition of a phasing proceeding, all such issues can be determined by the Board at one time upon resolution of that proceeding. Both parties will be fully protected because each will be eligible to obtain appropriate reparations and interest as required under a final phasing decision. CP&L does not suggest that the restoration of NS's ratemaking initiative be postponed. NS will thus be able to charge and collect prospectively the full amount of its common carrier rates (subject to any appropriate reparations being applied upon resolution of a phasing case), and CP&L will be protected from immediately paying refunds for rates that are ultimately found to violate the phasing constraint. Also, the parties and the Board will not be required to determine and account for appropriate reparations on more than one more occasion. Neither party will be prejudiced by such an arrangement in terms of its position on the merits in a phasing proceeding.<sup>2</sup>

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<sup>2</sup> Under 28 U.S.C. § 2344, CP&L has 60 days in which to file a petition for review of CP&L II before a federal court of appeals. While CP&L is evaluating its options as to an appeal, CP&L notes that it has purposely limited its petition for clarification or stay to the period until conclusion of a phasing proceeding. Since a phasing proceeding should be concluded before any appeal decision is rendered, this also furthers the parties' interest in the orderly process of adjudication.



## II. Affirmative Stay Relief is Warranted

If the Board determines that the effect of its CP&L II decision is to require the calculation and payment of a refund by CP&L at this time, CP&L respectfully requests that the Board issue either a general housekeeping stay or a full stay of CP&L II with regard to the resolution of reparation issues pending final resolution of a phasing proceeding.

The Board has utilized its authority to issue general housekeeping stays for periods of over 15 months in instances such as this where the unique circumstances of the case warrant relief, and without requiring the parties to address the requisite standards normally governing the full stay of an agency determination. See, e.g., Docket No. 42038, Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry., (STB served Apr. 18, 2000) (housekeeping stay effective for a period of over eight months pending further arguments on issues raised in reconsideration petitions); Docket No. AB-55 (Sub-No. 618), CSX Transportation, Inc. -- Discontinuance -- At Memphis, In Shelby County, TN, (STB served Nov. 22, 2002) (housekeeping stay postponing effective date of decision effective for a period of over 15 months "to permit the orderly consideration of the arguments raised" on reopening). Such a housekeeping stay of CP&L II on issues of reparations pending a phasing proceeding is likewise appropriate here for all the reasons set forth herein.

If the Board determines such a housekeeping stay is not warranted, CP&L respectfully submits that a full stay of the parties' reparations obligations pending

completion of the phasing proceeding is warranted. Under longstanding precedent, the Board has the authority to grant a stay when such relief is required under the Holiday Tours<sup>3</sup> standards. The standards governing disposition of a petition for stay are that: (1) the movant is likely to prevail on the merits; (2) the movant will be irreparably harmed in the absence of a stay; (3) issuance of a stay would not substantially harm other parties; and (4) issuance of a stay is in the public interest. Id. at 842-43. Accord Hilton v. Braunskill, 481 U.S. 770 (1987); Docket No. AB-596, New York City Economic Development Corp. -- Adverse Abandonment -- New York Cross Harbor Railroad in Brooklyn, NY, (STB served Aug. 28, 2003); Finance Docket No. 32760 (Sub-No. 36), Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al., (STB served Oct. 29, 1999). It is well-settled that a party seeking injunctive relief need not demonstrate the likelihood that it will succeed on the merits with mathematical precision; it can be enough to show that "a serious legal issue is presented." Holiday Tours, Inc., 559 F. 2d at 844. Also, even where the movant is not likely to prevail on the merits, a stay request will be granted if the other factors weigh in favor of a stay. Docket No. 41191, West Texas Utilities Co. v. The Burlington Northern and Santa Fe Ry. Co., (STB served June 25, 1996) at 3.

CP&L has a compelling case for staying the parties' reparations obligations pending completion of a phasing case under these standards. First, the Board has made available to CP&L the option of pursuing a phasing case because of the unusually large

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<sup>3</sup> Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

size of rate increases involved. At a minimum, the Board's recognition of these circumstances supports a conclusion that a "serious legal issue is presented." In any event, since the other three Holiday Tours prongs are also met, CP&L is entitled to stay relief.

Second, CP&L would be harmed by being required to undergo the process of determining the amount of refunds and paying such amount to NS under circumstances where such adjustments and payment might prove totally unnecessary due to application of the phasing constraint. Third, NS will not be harmed (and indeed is fully protected) because the immediate restoration of its ratemaking initiative will not be affected by granting a stay (subject to change upon resolution of a phasing case) and appropriate reparations and interest will be available to it (as they will be to CP&L) upon the disposition of a phasing case. Further, NS will be authorized to charge and collect rates during the pendency of a phase-in proceeding that, as found by the Board in CP&L I, in most instances are over 350% of its variable service costs. Fourth, the public interest favors a stay given the unique circumstances of this case and the fact that a temporary stay would not have a material impact on this proceeding or the parties, would not affect the restoration of NS's ratemaking initiative, would promote administrative convenience, and would otherwise protect CP&L from compliance hardship.

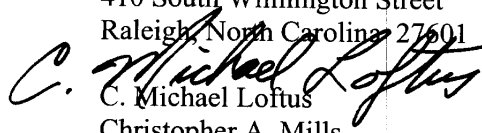
## CONCLUSION

For the foregoing reasons, CP&L respectfully requests that its Petition for Clarification or Stay be granted, and that the Board issue appropriate clarification or relief of the nature requested herein.

Respectfully submitted,

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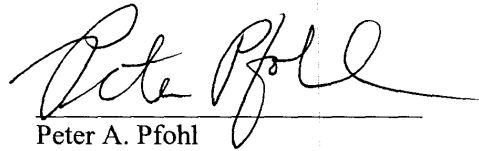
DATED: November 1, 2004

Attorneys for Complainant

**CERTIFICATE OF SERVICE**

I hereby certify that this 1st day of November, 2004, I have caused copies of the foregoing Petition to be served by hand on counsel for defendant Norfolk Southern Railway Company as follows:

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Terence M. Hynes, Esq.  
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